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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 BORNSTEIN SEAFOODS, INC.,

11 Plaintiff,

12 v.

13 CITY OF BELLINGHAM, et al.,

14 Defendants.

CASE NO. C21-0022JLR

ORDER DENYING PORT OF  
BELLINGHAM'S MOTION TO  
DISMISS

15 **I. INTRODUCTION**

16 Before the court is Defendant the Port of Bellingham's ("Port") motion to dismiss  
17 pursuant to Federal Rule of Civil Procedure 12(b)(1). (Mot. (Dkt. # 18); *see also* Reply  
18 (Dkt. # 30).) Plaintiff Bornstein Seafoods, Inc. ("Bornstein") opposes the motion and  
19 moves to strike portions of the Port's reply. (Resp. (Dkt. # 27); Surreply (Dkt. # 35).)  
20 Defendant the City of Bellingham ("City") has not responded to the Port's motion. (*See*  
21 *generally* Dkt.) The court has considered the motions, all submissions filed in support of  
22 and in opposition to the motions, the relevant portions of the record, and the applicable

1 law. Being fully advised,<sup>1</sup> the court GRANTS Bornstein’s motion to strike portions of  
 2 the Port’s reply and DENIES the Port’s motion to dismiss.

## 3 II. BACKGROUND

4 This action stems from efforts to clean up environmental contamination at the I &  
 5 J Waterway Site (the “Site”) in Bellingham Bay, Washington. (*See* Am. Compl. (Dkt.  
 6 # 7) ¶¶ 1-2.) Bornstein filed the instant lawsuit against the City on January 7, 2021.  
 7 (*See* Compl. (Dkt. # 1).) In its original complaint, Bornstein alleged that the City is liable  
 8 for the costs of cleanup and remedial action at the Site because the City’s stormwater  
 9 system and other City facilities are sources of hazardous substances that have  
 10 contaminated the Site. (*See generally id.* ¶¶ 1-7.) Bornstein asserted claims against the  
 11 City under the federal Comprehensive Environmental Response Compensation and  
 12 Liability Act (“CERCLA”) §§ 107 and 113, 42 U.S.C. § 9607 and 9613, and  
 13 Washington’s Model Toxics Control Act, chapter 70A.305 RCW (“MTCA”), for  
 14 contribution and for a declaratory judgment that the City is obligated to pay for all  
 15 remedial action costs that Bornstein has incurred or will incur related to contamination of  
 16 the Site. (*See id.* ¶¶ 33-62.) Bornstein did not name the Port in its initial complaint. (*See*  
 17 *generally id.*)

18 On February 1, 2021, the Port filed a separate lawsuit in Whatcom County  
 19 Superior Court. (*See* Woolson Decl. (Dkt. # 19) ¶ 3, Ex. A (Compl., *Port of Bellingham*

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21 <sup>1</sup> Bornstein requests oral argument. (*See* Resp. at 1.) The court, however, finds oral  
 22 argument unnecessary to its disposition of the motion. *See* Local Rules W.D. Wash. LCR  
 7(b)(4).

1 *v. Bornstein Seafoods, Inc.*, No. 21-2-00095-37 (Whatcom Cty. Super.) (“Port  
 2 Complaint”)). In that suit, the Port alleged claims under the MTCA against Bornstein  
 3 for contribution and for a declaratory judgment that Bornstein is strictly liable, jointly and  
 4 severally, for remedial action costs at the Site. (*See id.* ¶¶ 4.1-5.4.) The Port did not  
 5 assert any federal claims against Bornstein. (*See generally id.*) On February 25, 2021,  
 6 Bornstein answered the Port’s state-court complaint and asserted counterclaims for  
 7 contribution and for a declaratory judgment of liability under both the MTCA and  
 8 CERCLA §§ 107 and 113, 42 U.S.C. § 9607 and 9613. (*See Woolson Decl.* ¶ 4, Ex. B  
 9 (Ans., *Port of Bellingham v. Bornstein Seafoods, Inc.*) ¶¶ 7.1-8.9 (“Bornstein Ans.”).)  
 10 The City is not a party in the state court proceedings. (*See Port Compl*; Bornstein Ans.)

11 On February 26, 2021, the day after it filed its answer, Bornstein removed the  
 12 Port’s lawsuit to this court. (*See Not. of Removal* (C21-0245JLR Dkt. # 1).<sup>2</sup>) The Port  
 13 moved to remand on March 12, 2021. (*See Mot. to Remand* (C21-0245JLR Dkt. # 8).)

14 On March 18, 2021, Bornstein amended its complaint in this action to name the  
 15 Port as an additional defendant. (*See Am. Compl.*) Bornstein added claims against the  
 16 Port for contribution and for a declaratory judgment of liability under the MTCA and  
 17 CERCLA §§ 107 and 113—the same claims it alleged as counterclaims in the Port’s  
 18 Whatcom County action. (*See id.* ¶¶ 73-101.) On April 1, 2021, Bornstein moved to  
 19 consolidate this case with *Port of Bellingham v. Bornstein Seafoods*. (*See Cons. Mot.*  
 20 (Dkt. # 14).) On April 26, 2021, while the motions to remand and to consolidate were

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 22 <sup>2</sup> For ease of reference, the court identifies filings in *Port of Bellingham v. Bornstein Seafoods* by including the case number in the citation.

1 pending, the Port filed the instant motion to dismiss. (*See* Mot.) On April 27, 2021, the  
2 City answered Bornstein’s complaint in this action and asserted counterclaims against  
3 Bornstein for contribution and a declaratory judgment of liability under the MTCA and  
4 CERCLA §§ 107 and 113. (*See* City Ans. (Dkt. # 22) at 11-13).

5 On May 5, 2021, the court granted the Port’s motion to remand *Port of Bellingham*  
6 *v. Bornstein Seafoods* to Whatcom County Superior Court. (*See* 5/5/21 Remand Order  
7 (C21-0245JLR Dkt. # 17).) The court denied Bornstein’s motion to consolidate as moot.  
8 (5/5/21 Cons. Order (Dkt. # 25).)

### 9 **III. ANALYSIS**

10 The Port moves the court to abstain from exercising federal jurisdiction over this  
11 action and to dismiss or stay the case pursuant to *Colorado River Water Conservation*  
12 *District v. United States*, 424 U.S. 800, 813 (1976). (*See generally* Mot.) Bornstein  
13 argues that a *Colorado River* stay is not appropriate in this case and moves the court to  
14 strike certain arguments that, it asserts, the Port raised for the first time in its reply. (*See*  
15 *generally* Resp.; *see also* Surreply.) The court considers Bornstein’s motion to strike,  
16 then turns to the merits of the Port’s motion to dismiss.

#### 17 **A. Motion to Strike**

18 Bornstein asks the court to strike the Port’s argument, asserted for the first time in  
19 the Port’s reply, that the court should abstain from hearing this action under *Wilton v.*  
20 *Seven Falls Co.*, 515 U.S. 277, 288 (1995). (Surreply at 2-3; *see* Reply at 2, 6-7.) “New  
21 arguments may not be introduced in a reply brief,” *United States v. Puerta*, 982 F.2d  
22 1297, 1300 n.1 (9th Cir. 1992), and a court “need not consider arguments raised for the

first time in a reply brief,” *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007). If new facts or arguments are introduced, the nonmoving party may file a surreply requesting that the court strike the material. Local Rules W.D. Wash. LCR 7(g). Because the Port did not raise its argument regarding the applicability of *Wilton* until its reply, the court will not consider the argument and GRANTS Bornstein’s motion to strike the portion of the Port’s reply that advances this new argument.<sup>3</sup>

#### **B. Colorado River Stay**

The Port moves the court to either dismiss or stay this action pursuant to *Colorado River*. (See Mot. at 3-11.) It argues that Bornstein has engaged in “procedural gamesmanship” and forum shopping in an effort to “strip the state court of its rightful jurisdiction over state-law claims.” (*Id.* at 2.) The court finds that a dismissal or stay under *Colorado River* is not warranted in this case, and therefore DENIES the Port’s motion to dismiss.

Under *Colorado River*, there are, in rare cases, “principles unrelated to considerations of proper constitutional adjudication and regard for federal-state relations which govern in situations involving the contemporaneous exercise of concurrent jurisdictions, either by federal court or by state and federal courts.” *United States v.*

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<sup>3</sup> In any event, the court finds that the Port’s reliance on *Wilton* is misplaced. Because this action involves claims for contribution in addition to declaratory judgment claims (*see* Am. Compl.), *Wilton*’s relaxed abstention standard does not apply. *See R.R. St. & Co., Inc. v. Transport Ins. Co.*, 656 F.3d 966, 977-78 (9th Cir. 2011) (noting that (1) “claims that exist independent of the request for a declaration are not subject to the Declaratory Judgment Act’s discretionary jurisdictional rule” and (2) “if the district court must exercise jurisdiction over claims for damages, the court should also retain similar claims for declaratory relief to avoid piecemeal litigation.”).

1 *State Water Res. Control Bd.*, 988 F.3d 1194, 1202 (9th Cir. 2021) (quoting *Colo. River*,  
 2 424 U.S. at 817). In those situations, a district court can dismiss or stay a federal suit due  
 3 to the presence of a concurrent state proceeding. *Id.* (citing *Colo. River*, 424 U.S. at  
 4 817-18). Because of “the virtually unflagging obligation of the federal courts to exercise  
 5 the jurisdiction given [to] them,” however, “[o]nly the clearest of justifications will  
 6 warrant [a] dismissal’ or stay.” *Id.* (quoting *Colo. River*, 424 U.S. at 819). The court’s  
 7 “task in [such] cases . . . is not to find some substantial reason for the *exercise* of federal  
 8 jurisdiction by the district; rather, the task is to ascertain whether there exist  
 9 “exceptional” circumstances . . . to justify the *surrender* of that jurisdiction.” *Id.* at 1203  
 10 (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 (1983)  
 11 (emphasis in *Moses H. Cone*)). “If there is any substantial doubt as to’ whether ‘the  
 12 parallel state-court litigation will be an adequate vehicle for the complete and prompt  
 13 resolution of the issues between the parties . . . it would be a serious abuse of discretion  
 14 to grant the stay or dismissal at all.” *Id.* (quoting *Moses H. Cone*, 460 U.S. at 28).

15 The Ninth Circuit has listed eight factors that courts should consider in  
 16 determining whether a *Colorado River* stay is appropriate:

- 17 (1) which court first assumed jurisdiction over any property at stake; (2)
- 18 the inconvenience of the federal forum; (3) the desire to avoid piecemeal
- 19 litigation; (4) the order in which the forums obtained jurisdiction; (5)
- 20 whether federal law or state law provides the rule of decision on the
- 21 merits; (6) whether the state court proceedings can adequately protect the
- 22 rights of the federal litigants; (7) the desire to avoid forum shopping; and
- (8) whether the state court proceedings will resolve all issues before the
- federal court.

1 *Id.* (quoting *R.R. St.*, 656 F.3d at 978-79). “These factors are not a ‘mechanical  
2 checklist.’” *Id.* (quoting *Moses H. Cone*, 460 U.S. at 16). Rather, “[t]he weight to be  
3 given to any one factor may vary greatly from case to case, depending on the particular  
4 setting of the case.” *Id.* (quoting *Moses H. Cone*, 460 U.S. at 16). “Some factors may  
5 not apply in some cases, and, in some cases, a single factor may decide whether a stay is  
6 permissible.” *Id.* (internal citations omitted). There is a presumption that a partial  
7 *Colorado River* stay is inappropriate except in rare cases. *See id.* at 1206-07.

8 District courts should address the eighth *Colorado River* factor—“whether the  
9 state court proceedings will resolve all issues before the federal court”—as a preliminary  
10 matter. *R.R. St.*, 656 F.3d at 978-79, 979 n.9. This is because “‘the decision to invoke  
11 *Colorado River* necessarily contemplates that the federal court *will have nothing further*  
12 *to do in resolving any substantive part of the case*, whether it stays or dismisses.’” *State*  
13 *Water Res. Control Bd.*, 988 F.3d at 1203-04 (quoting *Moses H. Cone*, 460 U.S. at 28)  
14 (emphasis in *State Res. Control Bd.*).

15 The court concludes that the eighth *Colorado River* factor controls the outcome of  
16 the Port’s motion. *See id.* at 1208 (finding the eighth factor “dispositive” and concluding  
17 a stay was not appropriate where the United States’ immunity claim was not raised in the  
18 state court action). Here, the state court cannot resolve Bornstein’s claims against the  
19 City and the City’s counterclaims against Bornstein because those claims have not been  
20 raised in that action. As a result, this court cannot have “full confidence that the parallel  
21 state proceeding will end the litigation.” *See id.* (quoting *Intel Corp. v. Advanced Micro*  
22 *Devices, Inc.*, 12 F.3d 908, 913 (9th Cir. 1993)).

1       Where ““there exists a substantial doubt as to whether the state court proceedings  
2 will resolve all of the disputed issues in this case, it is unnecessary for [the court] to  
3 weigh the other factors included in the *Colorado River* analysis.”” *Id.* (quoting *Intel*, 12  
4 F.3d at 913 n.7); *see also id.* at 1204 (“We have repeatedly emphasized that a *Colorado*  
5 *River* stay is inappropriate when the state court proceedings will not resolve the entire  
6 case before the federal court.”); *Harris as Tr. of Edith Heinemann Harris Tr. v. Mundel*  
7 *as Tr. of Mundel Tr.*, --- F. App’x ---, No. 18-35669, 2021 WL 2172082, at \*2 (9th Cir.  
8 May 27, 2021) (declining to dismiss or stay case under *Colorado River* where there was a  
9 “substantial doubt” as to whether state court proceedings were capable of resolving all of  
10 the issues in the action). Because the state court proceeding will not resolve all of the  
11 claims at issue in this action, the court declines to apply *Colorado River* to dismiss the  
12 Port’s claims or stay this case pending the resolution of the state court action and need  
13 not weigh the remaining *Colorado River* factors. *See State Water Res. Control Bd.*, 988  
14 F.3d at 1208; *see also James River Ins. Co. v. Thompson*, No. CV-20-01052-PHX-DGC,  
15 2021 WL 1841676, at \*9 (D. Ariz. May 7, 2021) (applying *State Water Res. Control Bd.*  
16 in granting motion for reconsideration and vacating prior order staying case). The court  
17 DENIES the Port’s motion to dismiss.

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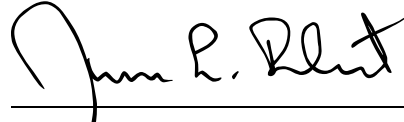
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**IV. CONCLUSION**

For the foregoing reasons, the court GRANTS Bornstein's motion to strike (Dkt. # 35) and DENIES the Port's motion to dismiss (Dkt. # 18).

Dated this 14th day of June, 2021.

A handwritten signature in black ink, appearing to read "James L. Robart", written over a horizontal line.

JAMES L. ROBART  
United States District Judge